No. 16,279

United States Court of Appeals

For the Ninth Circuit

LILLIAN HISAKO SATO and BLANCHE MASAKO SATO,
Appellants,

vs.

JOHN FOSTER DULLES, Secretary of State of the United States,
Appellee.

Appeal from the United States District Court for the District of Hawaii.

BRIEF FOR APPELLANTS.

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JURISDICTIONAL STATEMENT.

Plaintiff, Lillian Hisako Sato, a citizen of the United States by birth, (Tr. p. 3) voted involuntarily in a Japanese political election on April 10, 1946, (Tr. p. 5) and under the provisions of the Nationality Act of 1940 (Sec. 401(e)) then in force, she lost her United States citizenship. This plaintiff applied to a United States Consular Officer in Fukuoka, Japan on November 22, 1956, for registration as an American citizen and for a passport to Honolulu, Territory of Hawaii. On April 30, 1956, said consular officer in

response to said application issued to this plaintiff a certificate of loss of citizenship, bearing State Department approval under Section 501, of said Nationality Act of 1940 (Tr. pp. 4, 5). The District Court of the United States for the District of Hawaii, within whose jurisdiction this plaintiff claimed permanent residence, (Tr. p. 3) had jurisdiction under Section 503, of said Act to hear this plaintiff's application for a judgment declaring her to be a citizen of the United States.

This plaintiff's right to contest her loss of citizenship conferred on her by said Nationality Act of 1940, was preserved by the Savings Clause of the Nationality Act of 1952 (Sec. 405, 8 USC Sec. 1101, note) which is summarized post, p. 18.

This plaintiff's right to contest her loss of citizenship conferred on her by said Nationality Act of 1940, and said procedure therein provided for the exercise of said right survived the repeal of said Act by said Nationality Act of 1952, because the corresponding right and remedy provided by the latter Act (Section 360(b), 8 USC 1503 (b and c) is nugatory and further, because Section 349(5) of the latter Act, USC Sec. 1481(5) is invalid and Section 360 (b and c) of the latter Act, 8 USC 1503 (b and c) is consequently surplusage. Section 360 (b and c) of the 1952 Act (8 USC Sec. 1503 (b and c)) is summarized post at pages 12-13.

Plaintiff, Blanche Masako Sato, a citizen of the United States by birth, (Tr. p. 3) voted in Japanese

political elections on April 23, April 30 and July 20, 1951, and on October 5, 1952 and December 20, 1954 (Tr. p. 5). She applied to a United States Consular Officer on March 7, 1956 for registration as a citizen of the United States and for a passport to Honolulu, Territory of Hawaii (Tr. p. 4). On August 1, 1956, said consular officer in response to said application issued to this plaintiff a certificate of loss of citizenship, bearing State Department approval, under Section 401(e) of the Nationality Act of 1940 (Tr. p. 5). Sec. 503 of this same Act confers jurisdiction on the District Court of the United States for Hawaii to hear this plaintiff's application for a judgment declaring her to be a citizen of the United States, this citizen claiming permanent residence within the jurisdiction of said court (Tr. p. 3). This plaintiff is entitled to said remedy in said court despite the substitute provisions of the Nationality Act of 1952, for reasons above stated.

This is an appeal from an order of the District Court of the United States for Hawaii sustaining a motion to dismiss plaintiffs' complaint for lack of jurisdiction and dismissing said complaint (Tr. p. 19). The United States Court of Appeals for the Ninth Circuit has jurisdiction of the appeal (28 USC Sec. 1294(1)).

QUESTIONS INVOLVED.

This appeal involves the question of the validity of the voting provision of the Nationality Act of 1952

(8 USC Sec. 1481(5)), of the procedural provision of said Act (8 USC 1503 (b and c)) and of the survival of the procedural provision of the Nationality Act of 1940, if said provisions of the 1952 Act are held to be invalid. The appeal also involves the question of the effect of the Savings Clause of the Nationality Act of 1952 (8 USC Sec. 1101 note) in preserving Sec. 503, of the Nationality Act of 1940.

SPECIFICATIONS OF ERRORS.

I.

The trial judge erred in sustaining defendant's motion to dismiss the Amended Complaint and in dismissing the Amended Complaint.

II.

The trial judge erred in holding that Sec. 360 (b and c) of the Nationality Act of 1952 (8 USC Sec. 1503 (b and c)) was a valid substitute for Sec. 503, of the Nationality Act of 1940 and that said Sec. 503 was repealed to make room for the invalid provisions of Sec. 360 (b and c) of said Nationality Act of 1952 (8 USC Sec. 1503 (b and c)).

III.

The trial judge erred in failing to hold that 8 USC Sec. 1481(5) was invalid and that 8 USC Sec. 1503 (b and c) was surplusage, as related to said Sec. 1481(5).

IV.

The trial judge erred in failing to hold that 8 USC Sec. 1481(5) and 8 USC Sec. 1503 (b and c) taken together were invalid, the former section being unenforceable through the ineffective and invalid procedure of the latter section.

V.

The trial judge erred in holding that 8 USC Sec. 1503 (b and c) was a valid enactment.

VI.

The trial judge erred in failing to hold that Sec. 503, of the Nationality Act of 1940, provided the procedure for plaintiffs-appellants and conferred jurisdiction on the court below.

VII.

The trial judge erred in failing to hold that the Savings Clause of the 1952 Nationality Act preserved Sec. 503 of the Nationality Act of 1940.

ARGUMENT.

I.

SECTION 1481 (5) OF THE NATIONALITY ACT OF 1952, FORFEITING UNITED STATES CITIZENSHIP IN CONSEQUENCE OF THE CITIZEN'S VOTING IN A FOREIGN ELECTION DOES NOT APPLY TO PLAINTIFFS WHO WERE CITIZENS OF JAPAN AND THE UNITED STATES WHEN THEY VOTED IN JAPAN.

The Court in *Kawakita v. U. S.*, 343 U.S. 717, states the case for dual citizenship. It refers with approval

to a State Department ruling that a person with dual citizenship who lives abroad in the other country claiming him as a National, owes an allegiance to it which is paramount to the allegiance he owes to the United States. The Court says at page 435:

> "Of course, an American citizen who is also a Japanese National living in Japan has obligations to Japan necessitated by his residence there. There might conceivably be cases where the mere non-performance of the Acts complained of would be a breach of Japanese law."

A Japanese National, who is also a National of another country has the right and duty to vote in Japanese political elections under Japanese law.

In the *Kawakita* case, supra, it took treason to the U.S. to put a limit to our recognition of the duties which a dual citizen owed his other country and to our allowance of the performance thereof. The defendant had taken the position that as a dual citizen of Japan and the U.S. residing in Japan he could not be guilty of treason to the U.S., which may be theoretically sound. As a Japanese National it was his patriotic duty to adhere to and to fight for Japan and against her antagonist, the U.S. But this is the definition of treason in our Statutes. Only a citizen may be guilty of treason but because of the gravity of the offense, the Japanese National, who was also a National of the United States, was nevertheless held to be guilty of the offense. See "The Legal Effects of Dual Nationality", 17 Geo. Wash. L. Review 427, 429, cited in the *Kawakita* case, supra, at p. 433. There

is not this compelling reason to visit the prescribed penalty of forfeiture of American citizenship upon the citizen of Japan, who exercises his right of franchise in Japan.

The law of dual nationality is the law of the land. It must be assumed that when Congress enacted the 1940 and 1952 Nationality Acts, it had in mind the right and duty of our dual citizens to vote in elections in their other countries and our recognition of their right and duty so to do. It must be further assumed that in depriving citizens of their citizenship as result of their voting in foreign elections, Congress was exercising the sovereign power of fostering amicable relations with foreign powers and preventing friction therein, as held in *Perez v. Brownell,* 356 U.S. 44, 2 L.ed. 2d 603, in defense of the authority of Congress to denationalize citizens. But it would be a repudiation of the law of dual nationality and a slap in the face of a foreign country to frustrate its elections and to penalize its voters by taking away the American citizenship of those who were citizens of both countries. Congress could not have intended the affront. Congress could not have intended to deprive a Japanese National who was also a National of the United States of the right to representation in the matter of taxation, taxation without representation being a political anathema in the United States. When Congress provided that Nationals whether by birth or naturalization would lose their citizenship Congress meant only to include both kinds of citizens but not necessarily dual citizens. The section would have

meant the same thing if "whether by birth or naturalization" had been omitted. As stated in 50 Am. Jur. Statutes Sec. 346:

> "Indeed, . . . in cases where a contrary intent is not manifest, clear, obvious, or inescapable, or explicitly and unmistakably indicated by direct, peremptory and unambiguous language, it is presumed that no change in the common law was intended, and the statute is generally interpreted as affecting no such change."

Therefore, neither the voting provision of the 1940 Nationality Act (Sec. 401(e)) nor the same provision of the 1942 Nationality Act applies to plaintiffs. Their right of redress is under Sec. 503 of the 1940 Act for reasons hereinafter stated.

II.

THE VOTING PROVISION OF THE 1952 ACT (SEC. 349 (5), 8 USC SEC. 1481 (5)) AND THE REMEDY PROVIDED BY THE ACT (8 USC 1503 (b AND c)) ARE INVALID; THE REMEDY PROVIDED BY THE 1940 ACT (SEC. 503) CONTINUES IN EFFECT DESPITE THE PURPORTED REPEAL BY THE 1952 ACT.

Sec. 349(5) of the Nationality Act of 1952 (8 USC 1481(5)) provides that a National of the United States shall lose his nationality by voting in a political election in a foreign state. When does the loss of nationality occur? It would seem preposterous to construe the section to mean the opposite of what it says, that is, that the National shall not lose his nationality by so voting, at least until such time as he may avail himself unsuccessfully of the remedies pro-

vided in the 1952 Act (8 USC Sec. 1503). And yet this would seem to be the only possible construction of the Sections. Otherwise the sections would operate automatically and without a hearing, administrative, judicial or otherwise, which would be clearly had. Compare necessity for hearing in forfeiture cases. 25 C.J. Fines, Forfeitures and Penalties Sec. 53. The government could not in such an arbitrary manner relieve itself of its duty to protect citizens. Since the Sections provide no means for their execution or enforcement or for carrying their provisions into effect, standing alone, they would be invalid and void. 59 C.J. Statutes Sec. 176, p. 618.

An adequate remedy for the citizen victim is indispensable to the validity of the Section under consideration. Since both the government and the citizen are interested parties, in that the government may be relieved of its duty to protect the citizen and the citizen may lose his corresponding right as well as all his other rights of citizenship, both the government and the citizen would seem to be entitled to a remedy. But the government has none; it cannot initiate action under 8 USC Sec. 1503(b) to enforce or declare the loss of citizenship, which would seem of itself to be fatal to the Section under consideration. A consular officer may or may not know of the citizens voting, he may or may not recommend issuance of a certificate of loss of nationality under 8 USC Sec. 1501. In any case the issuance of such certificate and its approval by the Secretary of State are *ex parte* proceedings and ineffective for the same reason that the

provision for loss of nationality as a result of voting in foreign elections is ineffective as a self-executing provision. The issuance of a certificate of loss of nationality does not set in motion the procedure provided by said Sec. 1503; it is not the equivalent of the assertion by the erstwhile National of a right as a National as required by Sec. 1503(b).

On the other hand the citizen has a right to apply for admission to his country when and if he claims a right as a National and is denied such right by any department, independent agency or official of the United States. The right which the citizen must claim is a right which the department or independent agency or official is capable of granting, which is a narrow limitation. The citizen might claim and exercise all his constitutional rights as a citizen with exceptions noted, without bringing into play the remedy of the 1952 Act, and thereby jeopardizing his citizenship. The only right as a citizen which is withheld from him in consequence of his voting in a foreign political election is the right to come home. This right he may attempt to exercise only on pain of or at the risk of being denationalized. For reasons of health or finances the citizen may be compelled to forego returning to his country; in which case he would remain a citizen in full possession of all his rights as such, with the exception noted, though hampered, perhaps, in the exercise of some by his residence abroad. The section under consideration even aided by its remedy is futile, unenforceable and invalid.

Consistently with appellants' contention that 8 USC Sections 1481(5), the voting provision, and 1501, the certificate of loss of citizenship provision and Sec. 1503 (b and c), the remedy—all being provisions of the 1952 Act—are invalid, the government issued to appellant, Blanche Masako Sato, a certificate of loss of citizenship under the provisions of the 1940 Act (Tr. p. 5), although she voted in 1954, (Tr. p. 5) after the effective date of the 1952 Act, as if to accord and to concede to her the procedural rights of the former Act.

Since the voting Section of the 1952 Act. (8 USC Sec. 1481(5)) and the remedial Section of the Act 1503 (b and c) are invalid, the repealing provisions of the Act fail in so far as they relate to the voting Sec. 401(e) and the remedial Section 503 of the 1940 Act, which sections, therefore, continue in force, unaffected by said repealing provisions of the 1952 Act, and irrespective of the Savings Clause in said 1952 Act. 50 Am. Jur. Statute Sec. 523, citing *American Federation of Labor v. Rain,* 106 Or. 183, 106 P. 2d 544. It would seem to go without saying, *ex necessitate,* that a remedy provided in a repealed statute would survive the repeal, if the substituted remedy in the repealing statute were invalid. See *Application of Emmet O'Sullivan,* 161 ALR 487, 158 P. 2d 306; *Muzurek v. Insurance Co. of Jamestown,* 102 ALR 798, 181 A. 570.

The voting provision of the Nationality Act of 1940 (Sec. 401(e)) is invalid for the same reason that the corresponding section of the Nationality Act of 1952

(Sec. 1481(5)) is invalid. Procedure is provided under the former Act (Sec. 503) for the adjudication of the invalidity of said voting section. This procedure survives the repeal of the 1940 Act by the 1952 Act, because the substitute remedy provided in the 1952 Act is invalid for reasons above indicated and for further reasons given post at pp. 12-17.

III.

8 USC SEC. 1503 (b AND c) IS INVALID.

Under the provisions of 8 USC Sec. 1501 a consular officer, who may have reason to believe that a citizen has lost his citizenship under 8 USC Sec. 1481, is required to give his reasons for his belief to the Secretary of State for the latter's approval (8 USC Sec. 1501). No provision is made in case of disapproval by the Secretary of State. When the former citizen is denied a specific right belonging to citizenship, he may apply to the same consular officer, who recommended the issuance of a certificate of loss of citizenship in the first place, for a certificate of identity to come to the U.S. to apply for admission as an alien. The certificate of identity may be denied on the ground that applicant has lost his citizenship. If the application for a certificate of identity is denied, the Secretary of State, who had previously approved the issuance of the certificate of loss of citizenship after reviewing the facts in the matter, as presented to him by the consular officer, adjudges the application for the certificate of identity by way of appeal

from the denial of the certificate by the consular officer (8 USC Sec. 1503). If the Secretary of State approves the denial of the certificate, that is the end of the matter; and the erstwhile citizen remains stranded in a foreign land, deprived even of the benefit of the provisions of the Act relating to proceedings involving aliens seeking admission. If the erstwhile citizen succeeds in obtaining leave to come to the U.S. to apply for admission as an alien, his application is governed by said provisions of the Act relating to aliens, seeking admission, under which a special inquiry officer determines what evidence is to be received and the Attorney General on appeal considers only such evidence. The decision of the Attorney General is final (8 USC Sec. 1226). But under 8 USC Sec. 1503, the decision of the Attorney General may be reviewed in habeas corpus proceedings, the scope of which is narrowly circumscribed, and the right to which would have existed without the provision for it in the Act. In *Japanese Immigration Case,* 189 U.S. 86, 47 L.ed. 721.

In *Keilkila v. Barber,* 78 S.Ct. 603, 607, the court remarks that it expressed no opinion on the question whether habeas corpus is regarded as judicial review (note 12). Nor it is clear under the Act whether the review by habeas corpus provided by the Act is the conventional review in immigration cases or the review provided by the Administrative Procedure Act. 5 USCA 1009. The Act of September 27, 1950, 81st Cong., 2nd Sess., 64 Stat. 1048, provides: Proceedings under the law relating to the exclusion . . . of aliens

shall be without regard to the provisions of Sections 5, 7 and 8, of the Administrative Procedure Act (5 USC 1004, 1005, 1007). Section 1009 would seem to be left to apply to the exclusion of aliens.

In any case, if the erstwhile citizen gets over all these hurdles and he is at long last allowed to enter his former country, it is still unclear whether the right of entry accorded him embraces full rights of citizenship. If the procedure provided by 8 USC Sec. 1503 (b and c) constitutes due process, it is only because there is no limit to the extent to which administrative measures may delay, hinder, embarrrass, complicate and frustrate the right and remedy of a citizen, converted by Congress into an alien, to challenge the metamorphosis or to re-establish his citizenship.

In *Perez v. Brownell,* 356 U.S. 44, 2 L.ed. 2d 603, the court by a 5-4 decision upheld Sec. 401 of the Nationality Act of 1940, providing for the forfeiture of American citizenship in consequence of voting by citizens in political elections in a foreign state.* The court defends the Act on the ground that its application is subject to judicial scrutiny, that is, the court says that specific applications of the provision as to political elections are open to judicial challenge. The court itself qualifies "political elections" by referring to them as elections of significance in a foreign coun-

*This, apparently, is erroneous. Whitaker, J., in his separate opinion says the court did not deem it necessary to pass on the constitutionality of the voting provision (401(e)) of the 1940 Nationality Act.

try. The determination of such significance is a judicial function under the court's decision.

The 1940 Act provided for judicial review by declaratory judgment as to the loss of citizenship by voting by a citizen in a foreign political election. The 1952 Act does not provide such review where the erstwhile citizen is without the United States, certainly not where he fails to obtain leave to return to apply for admission. Hence the court's defense of the 1940 Act as stated above, in the *Perez* case, supra, does not apply to the 1952 Act.

Senate amendments, which were adopted to the House Bill, which became the 1940 Nationality Act, included, *inter alia,* a provision for procedure by which persons administratively declared to have expatriated themselves might obtain judicial determination of their citizenship. 86 Cong. Rec. 12817-12818, *et ante.*

In enacting 8 USC Sec. 1503, Congress presumably had in mind the distinction laid down by *United States v. Ju Toy,* 198 U.S. 253, 49 L. ed. 1040; *Tang Tun v. Edsell,* 223 U.S. 673, 56 L. ed. 606; *Ng Fung v. White,* 259 U.S. 276, 66 L. ed. 938, between applicants for admission to the U. S. who were without and those who were within the U. S. at the time of the application. The former, it was held, may be adjudged never to have been citizens by executive officers, who are authorized finally to determine whether or not the person was a citizen by birth. In the case of the loss of citizenship as a result of voting abroad, the erst-

while citizen's former U. S. citizenship by birth is conceded and the question is whether executive officers may determine that he forfeited his citizenship. Does the authority of executive officers as determined by the above cited cases extend to the determination of whether, although a former citizen, a person has lost his citizenship? In both cases the result of the executive officer's decision may be to make of the applicant citizen an alien. But in the former there is the single fact issue of place of birth, while in the latter there are issues as to whether the erstwhile citizen voted voluntarily, the character of the voting, the kind of election i.e. whether it is one of political significance, as to whether the country in which the election is held must be a sovereign country and if so whether the country involved is a sovereign state, whether the act constituting the officers' authority is valid. It would be a travesty to assign purely legal problems to laymen; it would not comport with due process. So far as counsel knows the Supreme Court has never recognized the power of Congress to delegate such authority to executive officers. Indeed, the power of Congress to denationalize citizens by birth was first recognized and upheld in *Perez v. Brownell,* (1958) supra. The forfeiture of citizenship as provided in the 1952 Act, would seem to be analogous to statutory forfeitures in general, which require judicial determination. 37 C.J.S. Forfeitures Sec. 5(b). The *Perez* case did not pass on the constitutionality of the voting provision (401(e)) of the 1940 Nationality Act. See separate opinion of J. Whitaker.

Congress may exclude aliens through the agency of executive officers. In the nature of things, these officers will make mistakes and exclude citizens. But the exclusion of citizens is not intended and is only an inevitable incident of the exercise of the power to exclude aliens. It does not follow however, that Congress may make an alien of an acknowledged citizen through the agency of executive officers.

The distinction between resident and non-resident citizens with respect to the remedy provided by 8 USC Sec. 1503, is arbitrary, unreasonable and capricious, being based on the innocuous and fortuitous circumstance of their whereabouts when they are alleged to have forfeited their citizenship by the secret ballot. This appears in the case of a dual citizen, residing in the U. S., who votes by absentee ballot in an election held in the other country of which he is a citizen. Japanese Nationals may so vote, though Nationals of the U. S. and residing here. No reason is perceived why such a citizen should be in a more favored position to contest his loss of citizenship than the citizen who did the same thing while abroad and thereby incurred the same loss.

8 USC Sec. 1503 (b and c) being invalid as a substitute for Sec. 503 of the Nationality Act of 1940, the latter section survives repeal by the 1952 Nationality Act.

IV.

SAVINGS CLAUSE OF 1952 ACT.

Pertinent parts of the Savings Clause of the 1952 Act (8 USC Sec. 1101, note) follow:

Nothing contained in this Act shall be construed to affect . . . any status, condition, . . . act, thing, liability, obligation or matter done or existing at the time this Act shall take effect; but as to all such conditions, acts, things, statuses, liabilities, obligations or matters, the statutes or parts of statutes repealed by this Act are . . . hereby continued in force and effect.

The all inclusive language of the Savings Clause of the 1952 Act indicates that the Statutory status *quo ante* was intended to be preserved. Literally construed the Savings Clause would seem to mean that Sec. 360 (b and c), the procedural section, of the Act shall not affect the act of voting by a citizen in a foreign political election prior to the effective date of the Act or his consequent status, liability or obligation, as to which things Sec. 503 of the 1940 Nationality Act, the procedural section is continued in force.

If Congress intended to preserve the remedy provided by the 1940 Act so far as forfeiture of citizenship, its enforcement and relief therefrom are concerned, its intention so to do would override any artificial general rule of construction that savings clauses do not preserve remedies where new remedies are provided. That Congress did so intend seems to be clear.

There is nothing in the Savings Clause of the 1952 Act, making affirmative action by the erstwhile citizen

or by the government a condition to the application of the clause; a mere condition unaccompanied by an affirmative act suffices, *United States v. Menascha,* 348 U.S. 538. See *United States v. Cain,* 147 F. Supp. 449, construing the Savings Clause of the 1940 Act.

The 1952 Act operates prospectively (*United States v. Menascha,* 348 U.S. 538, supra). The Act applies to voting by a citizen in a foreign political election after its effective date and provides a remedy for loss of citizenship because of such voting. It leaves the voting provision of the 1940 Act unaffected as well as provisions relating to the act of voting, the consequent loss of citizenship and the related remedy provided therefor. The sweep of the Savings Clause of the 1952 Act cannot be restricted so as to preclude this result.

It is respectfully submitted that the judgment below be reversed and that the case be remanded for further proceedings.

Dated, Honolulu, T. H.,
May 11, 1959.

BRAHAN HOUSTON,
Attorney for Appellants.